Guidance for submission to Building Safety Bill call for evidence

Link to call for evidence: https://committees.parliament.uk/submission/#/evidence/228/preamble

THESE NOTES ARE FOR GUIDANCE ONLY AND ARE BASED ON OUR READING OF THE DRAFT BILL WITHOUT ANY LEGAL INPUT. PLEASE DO NOT SIMPLY COPY AND PASTE THESE GUIDANCE NOTES. INCLUDE SOME OF YOUR OWN EXPERIENCES OF BUILDING SAFETY ISSUES, THE RESULTING COSTS AND VIEWS ON THE PROPOSALS.

How well does the Bill, as drafted, meet the Government's own policy intentions?

The government's policy intentions (set out in the BSB Impact Assessment) are to:

- Improve building safety and performance for all buildings.
- Establish a more stringent fire/structural safety regime for high-risk buildings (initially buildings of >6 storeys/>18m in height.
- Establish stronger oversight, clearer accountability and stronger duties on those with responsibility for the safety of buildings.
- Give residents a stronger voice in the system.

We do not believe that the draft Bill will achieve its aims because:

- It continues to rely on third parties' to validate the safety of building. This approach has not worked in the past, as evidenced by the failures that the current building safety crisis has demonstrated.
- It continues to pass on costs to leaseholders. Leaseholders cannot afford to pay further costs and safety work will not be carried out until building owners have collected funds. The result will be leaseholders having to give up their homes and buildings remaining unsafe.
- The primary legislation does not include the detail to make the regulations workable and relies heavily on secondary legislation. The sector could be faced with continual updates to regulations resulting in unpredictable costs and issues with demonstrating blocks are safe and mortgageble. The effect this can have on the market generally is evidenced by the current EWS1 problems.

Recommendations

In order to achieve its aims, we believe that the focus of the Bill should be on ensuring the safety of buildings through practical and proportionate measures and appropriate cost-sharing between building owners, developers and leaseholders.

Secondary legislation required to implement the regulations should be kept to a minimum to avoid drastic changes after the Bill is implemented. Where secondary legislation is required, the government should engage with interested parties (leaseholders, residents, management companies, property owners, insurers etc.) to understand the effect of any changes.

Does the draft Bill establish an appropriate scope for the new regulatory system?

We do not believe the Bill establishes an appropriate scope because:

- It fails to draw a distinction between future building safety costs and costs for remediating historic defects.
- There is nothing in the Bill to protect leaseholders from the costs of remedial works where there has been a failure by others (e.g. lack of clarity in government regulation/failures in building control or developers breaching regulations).

- The Bill fails to draw a distinction between ‘safety measures’ and ‘improvements’ and changes that would usually be considered an improvement (e.g. sprinkler systems) are given as an example of a building safety measure. Leases often state that building improvements are the responsibility of the building owner and the Bill could override these terms and allow costs to be passed to leaseholders through the new regime.
- Overriding the terms of a lease has been highlighted as a human rights issue in relation to freeholders charging ground rents but this is being allowed in the case of leaseholders.
- The draft bill gives the Secretary of State the power to change and bring more things in scope in the future. This means that rectification of any further defects discovered in future, which arise out of a failure of the regulatory regime or construction defects which were not previously in scope, will be charged to leaseholders under the guise of building safety measures.
- The scope of the buildings to which the Bill will apply will also cause problems. The gradual roll-out to existing buildings will take years and even a decade, by the government’s calculations. This will leave leaseholders in these buildings in limbo while they aren’t able to demonstrate that their buildings comply with new safety standards but still needing to insure, sell and re-mortgage their properties. These issues will disproportionately effect buildings between 11-18m in heights which are neither the highest nor lowest risk.

Recommendations

The Bill should clearly define ‘building safety measures’ which should be as narrow as reasonably possible to ensure improvements aren’t charged to leaseholders.

Liability for historic costs and failure on the part of others should be explicitly excluded from the Bill.

The Bill should include interim measures and protections to ensure leaseholders are not trapped in buildings whilst they are waiting for the new regulatory regime to be rolled out. These buildings must not be subject to increased insurance costs or lack of access to the finance and mortgage market simply because they are deemed lower risk and therefore not at priority for moving to the new regulatory regime.

The rectification of any further defects discovered or brought in scope subsequently must be defined as an improvement, and out of scope of the building safety charge, with clear responsibilities drawn about who pays – not leaseholders, as these are improvements to buildings after construction.

Will the Bill provide for a robust – and realistic – system of accountability for those responsible for building safety? Are the sanctions on those who do not meet their responsibilities strong enough?

- We believe that the focus of the bill should be on a proportionate system of accountability.
- The Bill imposes onerous duties on the accountable person which will inevitably lead to increased building safety costs for demonstrating compliance, but this will not necessarily make the buildings any safer. Funds which will be spent on assessing/demonstrating the safety of a building would be better spent on improvement works and practical measures to improve safety.
- The Bill puts a significant amount of responsibility on the ‘accountable person’ which, we believe, actively prevents leaseholders from feasibly being able to manage blocks themselves. Although RTM/RMC sites are equally as capable (and often more capable) as landlord managed sites to carry out this role, the responsibilities and liabilities may mean that they are unable to obtain insurance at a reasonable cost.

- The Bill does not place any responsibility on developers who have made significant profits from the current unsatisfactory regulatory regime. The only change introduced by the legislation that could affect the liability of developers is a change to the limitation period for claims to 10 years. This is completely inadequate and insufficient. The current building safety crisis demonstrates that many leaseholders are not aware of these defects until many years after the buildings were constructed and, in many cases, development companies have ceased trading. We are concerned that the Landlord and Tenant Act is being amended significantly to pass new building safety costs to leaseholders, but there are no significant changes to hold developers to account for building safety defects.

Recommendations

- Before introducing legislation, the government should consult with insurance companies to ensure that professional indemnity insurance will be readily available, at affordable and reasonable rates, both for those responsible for building safety under the new regime, and directors of RTM/RMC sites.
- A proportionate approach should be taken to demonstrating building safety which will not come at significant additional costs to leaseholders.
- The Bill should introduce a developer bond/levy which should be used to pay towards historic remediation costs.
- The loophole which allows developers to build, sell leases and then immediately cease trading and reincarnate as new companies to prevent liability arising from future defects must be closed in law.

Will the Bill provide strong mechanisms to ensure residents are listened to when they have concerns about their building's safety?

- The introduction of resident engagement is a positive step, as is a system to make complaints and escalate them where necessary.
- However, the extent of mandatory engagement is limited and the subject of engagement is unclear.
- The Bill does not recognise the distinction between leaseholders and residents (who may not be leaseholders and therefore not liable for costs).
- Similar resident engagement committees have been used previously, especially in the social sector, but many leaseholders are completely unaware of their existence and organisations acting on behalf of leaseholder are excluded from those committees.
- If you have any personal experience of resident engagement from your building owner/management company, include details of this and how you can see this engagement working.

Recommendations

- The Bill should provide a requirement to consult with leaseholders on appropriate topics (such cost/benefit analysis, the introduction of further obligations and other practical issues).
- Building owners/managers remain reluctant to engage voluntarily with leaseholders and clear regulation is required to bring about this change.
- Recommendations have been made by leaseholder organisations to introduce a resident group on all sites to allow more effective engagement.

Is the government right to propose a new Building Safety Charge? Does the bill introduce sufficient protections to ensure that leaseholders do not face excessive charges and that their funds are properly managed?

- It is a positive step that the building safety charge will be accounted for separately.
- We believe it is likely that excessive charges will still be able to be passed to leaseholders and there are no clear mechanisms to prevent that.
- The Bill allows building owners to circumvent current protections for leaseholders in order to recover building safety charges – ie paying within 28 days. This overwrites the terms of lease agreements and protections currently in place for leaseholders, which say that any charges over £250 must be subject to a Section 20 consultation. The Building Safety Charge bypasses the S20 process, and makes it very easy for building owners to bill huge extra charges to leaseholders without any consultation with leaseholders or due process, under the guise of building safety – and all are to be paid within 28 days, under threat of lease forfeiture. Many first tier tribunal decisions already made show that any challenges to the Building Safety Charge by leaseholders are unlikely to be favourably considered by first tier tribunals, and leaseholders have no effective recourse to challenge these charges. The very short timeframe of 28 days places further burden on leaseholders to pay for building safety, which the government has previously said should be the responsibility of the building owner.
- Table 36 of the Impact Assessment states a potential cost per leaseholder of £78,000, which excludes the costs of moving to the new regulatory regime. This is simply unaffordable to the majority of leaseholders. Even the weighted average cost of £9,000 will be too much for most leaseholders, many of whom will be first-time buyers or those needing affordable housing. In addition, there will be even more costs associated with moving to and maintaining the requirements of the new regulatory regime, all of which are currently passed on to leaseholders under the draft bill. This is unjust and at odds with the government's proclamations that developers and freeholders should be paying to make buildings safe.

Recommendations

- The additional costs associated with moving to and maintaining the new regulatory regime must be subject to the same protections as all other service charges and subject to Section 20 consultations for amounts above £250.
- In addition, any costs associated with rectifying historic safety defects from the time of construction, such as but not limited to combustible cladding, insulation, render, timber balconies, compartmentation issues and lack of fire breaks, must not form a part of the building safety charge.
- The costs of rectifying building safety defects brought within scope in future by MHCLG or the Secretary of State must not form a part of any building safety charge. Any costs associated with the retrospective application of new, amended or newly clarified building regulations must not be made part of a building safety charge – it is this very principle which has caused the cladding scandal to arise and cause misery to millions of innocent people. The draft bill must be amended to clearly identify what is included and what is excluded from any building safety charge.
- The arbitrary timeline of 28 days for payment must be removed.

Is it right that the new Building Safety Regulator be established under the Health & Safety Executive, and how should it be funded?

- We believe the Building Safety Regulator should be funded by developers.
- Passing costs to building owners/management companies would only be acceptable if they were prevented from simply passing those costs onto leaseholders.
- The regulator should not be funded by leaseholders in any circumstances.

Does the Bill present an opportunity to address other building safety issues, such as requirements for sprinkler systems?

- We believe the bill should not indiscriminately mandate the requirements for specific measures such as sprinklers. In many existing buildings, sprinklers may not be possible to retro-fit. Mandating their installation without considering the specifics of the building will lead to such buildings not just becoming unsaleable and unmortgageable in future, it will also lead to huge unaffordable increase in insurance costs for these buildings.
- Putting in additional measures to address building safety issues in existing buildings such as fire alarms or sprinklers is welcome. However these measures have arisen because the buildings were constructed in an unsafe manner – they have not arisen out of the fault of leaseholders. Therefore, installation of additional safety measures such as fire alarms or sprinklers in existing buildings
- must be clearly described as an improvement to the building, for which the costs must be legislated to rest either with the freeholder, developer or government, not the leaseholder.

Additional points

- The Bill creates additional obligations in relation to documentation which does not take into account the current problems being faced by leaseholders (e.g. the EWS regime/insurance premiums).
- The potential costs which could be passed to leaseholders as a result of the Bill will likely affect the value of leasehold properties, making them less saleable and potentially making city-centre living unsustainable. This is at odds with the government policy focused on providing affordable homes.
- Prior to implementing legislation, government should ensure that it has engaged and if necessary, legislated to ensure that leaseholders are able to access insurance on reasonable premiums. It must also ensure that there is enough supply of qualified assessors, fire engineers, surveyors in the UK to complete these checks that will be necessary for obtaining these new documents that the Accountable Person and Building Safety Manager need to procure. The government must also ensure that these assessors, engineers and surveyors have adequate Professional Indemnity cover to provide the documents necessary, before any draft bill passes into law.